BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROLLIN EUGENE SMITH, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,873
BEACHNER CONSTRUCTION COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the December 23, 2010, Award of Administrative Law Judge John D. Clark (ALJ). Claimant was found to have suffered a 20 percent permanent partial whole person functional impairment, followed by a 79 percent permanent partial general (work) disability as the result of the accident suffered on August 22, 2008, while working for respondent. Claimant's award was based upon an average weekly wage of $387.13. Claimant was also awarded all outstanding medical treatment and unauthorized medical treatment up to the statutory limit, with future medical to be considered upon proper application to the Director.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on April 5, 2011.

ISSUES

1. Was the medical opinion of Dr. Prostic properly admitted into evidence in this matter? Respondent contends that Dr. Prostic violated the restrictions of K.S.A. 2008 Supp. 44-510h(b)(2) by utilizing the unauthorized medical allowance to provide claimant with a functional impairment opinion. Claimant contends that Dr. Prostic

provided only an opinion regarding claimant's need for ongoing medical treatment and the opinion regarding claimant's functional impairment stemmed from a separate examination paid for totally by claimant. The Board must also decide whether this matter was properly presented and decided by the ALJ. Additionally, was there a timely objection by respondent at the deposition of Dr. Prostic or at the time of the regular hearing?

2. What was claimant's average weekly wage (wage) on the date of accident? Claimant contends that he was being paid $10.00 per hour and worked regularly over 40 hours per week with overtime. Respondent contends that respondent's exhibit 1 to the regular hearing[1] displays claimant's wage leading to the accident and the adoption of that wage by the ALJ should be affirmed.

3. What is the nature and extent of claimant's injuries and disability? Claimant contends that he is permanently and totally disabled as the result of the injuries suffered on August 22, 2008, and the resulting physical and psychological problems. In the alternative, claimant contends that he is entitled to a permanent partial whole person general (work) disability. Respondent contends that claimant has proven only a scheduled injury to his left lower extremity and any psychological damage was preexisting or the result of long-term family, health and legal problems which claimant had experienced for many years prior to his employment injury with respondent.

4. Was there an underpayment of temporary total disability? This issue is listed by respondent in its brief to the Board. But no argument was presented in either respondent's brief to the Board or during oral argument. Additionally, the issue was neither listed nor decided by the ALJ in the Award. Therefore, the Board will not address this issue.

FINDINGS OF FACT

Claimant worked for respondent as a laborer in its road and bridge construction business. On August 22, 2008, approximately 2 1/2 days after he was hired, claimant was helping finish a job in Goddard, Kansas, and was helping pick up road signs to put them into a trailer. As claimant was handing a sign to a co-worker, the trailer suddenly moved forward while claimant was only partially on the trailer. Claimant fell and the trailer ran over claimant's legs, causing significant injury to his left leg. Claimant was dragged for several feet by the trailer. Claimant was transferred by ambulance to Via Christi St. Francis Regional Medical Center where x-rays were taken of his leg and claimant was given medication. The following Monday, claimant was examined at Labette

[1] Respondent's Exhibit 1 to the regular hearing is a document entitled Certified Payroll Report.

County Medical Center and ultimately underwent an MRI of the leg. The MRI showed a broken leg with evidence of a fracture at the posterior medial tibial plateau, tears of the medial and lateral meniscuses and a tear of the ACL.

Claimant came under the care of board certified orthopedic surgeon Kevin M. Mosier, M.D., on September 5, 2008. After an evaluation of claimant's injuries, Dr. Mosier performed partial medial and lateral meniscectomies, a chondroplasty of the patella and debridement of the ACL on September 9, 2008. Dr. Mosier found that claimant reached maximum medical improvement (MMI) on April 6, 2009. The torn ACL, the torn medial meniscus, the torn lateral meniscus and the tibia plateau fracture were all related to the injury on August 22, 2008. Utilizing the fourth edition of the AMA *Guides*,[2] Dr. Mosier rated claimant at 20 percent impairment to the whole person. The whole person rating was due to claimant having a significant limp. Claimant testified that he advised Dr. Mosier about pain in his back, hips and right leg. However, the medical reports of Dr. Mosier contain no indication of pain anywhere other than claimant's left leg.

Dr. Mosier was provided a job task list created by vocational specialist Karen Crist Terrill and asked to evaluate claimant's ability to return to employment. Of the 83 tasks on Ms. Terrill's list, claimant was found to be unable to perform 56 tasks for a task loss of 67.5 percent. Dr. Mosier, likewise, was asked to review the task list created by vocational expert Steve Benjamin. Of the 90 tasks on that list, claimant was unable to perform 52 tasks for a task loss of 58 percent. Dr. Mosier released claimant to return to sedentary to light-demand work. In the doctor's opinion, claimant did not have the necessary physical ability to return to his job as a construction flagman or laborer for respondent.

For ongoing care, claimant was being treated by Rick D. Schoeling, M.D., his family physician in Pittsburg, Kansas. After the surgery, claimant used crutches for 6 to 8 weeks and has walked with a limp since that time. Claimant was prescribed 800 mg. Ibuprofen and Darvocet for pain. He usually takes the pain medication 2 to 3 times per day.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on April 17, 2009. Claimant displayed pain in and about his left knee. The abnormal gait caused by the left knee problem created pain at times about claimant's hips. Claimant walked with a mild antalgic gait. Claimant had fairly severe atrophy of the left thigh muscles, with a one-inch atrophy of the thigh when compared to the right, four inches above the superior pole of the patella. Claimant displayed a loss of about 10 degrees of range of motion of the knee with both flexion and extension. Dr. Prostic agreed that a person who walks with an altered gait is at risk of developing problems in other areas of the body. It was recommended that claimant be on intensive quadriceps retraining exercises.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Prostic contacted claimant's attorney with a request that he be allowed to review additional medical records from Dr. Mosier and provide a functional impairment rating on the left lower extremity. Dr. Prostic noted claimant's multiple surgeries and the manipulation under anesthesia and steroid injection on November 4, 2008. In the May 19, 2009, report, Dr. Prostic rated claimant at 30 percent impairment of the left lower extremity. Dr. Prostic expressed concern that claimant may develop posttraumatic osteoarthritis and could require reconstructive surgery in the future.

Claimant returned to Dr. Prostic, again at his attorney's request, on June 9, 2009. At that time claimant alleged increased pain across his low back and into his hips and somewhat up into his back. Claimant also alleged pain into the right knee. Claimant displayed decreased ability to flex forward, to extend backward and somewhat to tilt to each side. Claimant displayed an antalgic gait and his left thigh, four inches above the superior pole of the patella, measured one inch smaller than the right. X-rays of the lumbar spine showed mild disc space narrowing at L4-5. Dr. Prostic determined that claimant had aggravated his low back from the abnormal gait and body mechanics. An additional 5 percent functional impairment to the whole body was assessed due to the low back problems. Dr. Prostic recommended that claimant perform sedentary activities with some light lifting only.

Dr. Prostic was provided the November 20, 2009, report of vocational expert Karen Crist Terrill. Of the 83 tasks on the list prepared by Ms. Terrill, Dr. Prostic opined that claimant could only perform 51 tasks for a 62 percent task loss. Dr. Prostic was also provided the January 5, 2010, report of John D. Pro, M.D., which assessed claimant a 14 percent whole person impairment for claimant's ongoing psychiatric impairment. Dr. Prostic then combined the impairments to assess claimant a 28 percent whole person impairment on a functional basis. After considering claimant's circumstance, Dr. Prostic determined that claimant was permanently and totally disabled from substantial and gainful employment.

On cross-examination, Dr. Prostic acknowledged that claimant had displayed no low back limitations during the May 19, 2009, examination. During the June 9, 2009, examination, he found claimant's spine alignment to be normal, claimant displayed no tenderness or muscle spasm in the low back and there were no trigger points in claimant's low back. Additionally, claimant's x-rays of the low back were essentially normal and claimant had a negative straight leg raise test. Dr. Prostic had earlier adopted the restrictions of Dr. Mosier which were consistent with the FCE. When Dr. Prostic examined claimant on June 9, 2009, he added no additional restrictions.

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Kam Fai Pang, M.D., on October 26, 2009. The history provided to Dr. Pang regarding claimant's accident was consistent with claimant's testimony.

Dr. Pang was also provided medical reports from Dr. Mosier and Dr. Prostic. Claimant reported pain from 1/10 to 5/10 for the low back as well as bilateral knee pain, worse on the left side. Claimant's low back pain increased with prolonged standing and walking. Claimant complained of stiffness of the left knee in the morning and instability of the left knee while walking on uneven ground. Claimant attributed the low back pain to his abnormal gait, when the knee pain was severe.

On examination, claimant walked with a slight limp with decreased flexion of the left knee. He displayed a flexion of the lumbar spine at 80 degrees, with normal being 90 degrees. Extension was 10 degrees, with normal being 20 degrees. Claimant's straight leg raising was negative bilaterally without radiation of pain. The left knee displayed mild crepitus on range of motion but no laxity of the collateral ligaments. Claimant displayed no atrophy in the left thigh but was 2 centimeters smaller in the left calf than the right.

Dr. Pang assessed claimant a 5 percent whole person functional impairment to the low back, based upon the fourth edition of the AMA *Guides*.[3] Dr. Pang opined that claimant's low back pain was likely related to the abnormal mechanic of the left knee and the stress of walking with an abnormal gait.

Claimant was rated at 22.5 percent functional impairment of the left lower extremity which converts to a 9 percent whole person functional impairment for the left lower extremity, again pursuant to the fourth edition of the AMA *Guides*.[4] Thus, the combined total of the extremity and low back impairments equals a 14 percent whole person permanent impairment.

Claimant was referred by his attorney to board certified psychiatrist John D. Pro, M.D., for an evaluation on January 5, 2010. Claimant was found to have preexisting alcoholism problems as well as an adjustment disorder with depressed mood. Claimant's psychological condition was also affected by hypertension, a history of traumatic injury to and the loss of his right eye, his work injury with respondent and chronic smoking. Additionally, claimant had a history of violence, having pulled a gun on his wife and children, holding them hostage, being incarcerated on more than one occasion and being issued an undesirable discharge from the US Army. The Axis I psychiatric diagnosis was taken from DSM-IV.

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[3] AMA *Guides* (4th ed.).

[4] AMA *Guides* (4th ed.).

Claimant was rated at 25 percent impairment of the whole person from the psychological problems pursuant to the second edition of the AMA *Guides*.[5] Ten (10) percent of claimant's psychological impairment was determined to be preexisting. Dr. Pro determined that claimant's adjustment disorder was related to his injury with respondent primarily due to the pain that claimant experienced from the accident. Dr. Pro acknowledged that the fourth edition of the AMA *Guides*[6] does not contain a specific impairment rating for psychological impairments, but it does refer to the second edition of the AMA *Guides*,[7] the last edition to provide such ratings.

Dr. Pro went on to testify that claimant's psychological problems began to first manifest themselves in April 2009. However, the diagnostic criteria set forth for the diagnosis of an adjustment disorder in DSM-IV-TR, the most current edition of the DSM-IV, states that the development of emotional behavioral symptoms in response to an identifiable stressor should occur within three months of the onset of the stressors. Dr. Pro also acknowledged that he did not perform any objective diagnostic testing or have claimant fill out any forms or questionnaires during the evaluation. He examined claimant only once.

Claimant was referred by respondent to clinical neuropsychologist Shelley McDaniel, Ph.D., on April 12, 2010. Dr. McDaniel performed a variety of tests on claimant. One test, the Wechsler Adult Intelligence Scale, Fourth Edition, is used to establish a person's intellect. Dr. McDaniel also performed the California Verbal Learning Test, a memory scale, testing short- and long-term memories. In this, claimant tested average. In the Comprehensive Trail Making Test, which tests cognitive flexibility, claimant was average. Dr. McDaniel also performed the MMPI-2 and the Millon Multiaxial Clinical Inventory III and a TOMM, which is a test of memory and malingering. Claimant's perceptional organization was higher than his verbal IQ, consistent with the types of jobs claimant had selected over the years.

The MMPI-2 test contained a validity scale used to indicate an exaggeration of symptoms. This scale, called the "fake bad scale" or FBS, indicated the probability of malingering symptoms. The closer a male comes to 29 on the scale, the more likely he is trying to present his symptoms as worse than they really are. Claimant's FBS was 24. Claimant also tested positive for somatization, or a fixation on his physical symptoms beyond a normal level. Claimant was diagnosed with preexisting personality features and preexisting coping skills that were not impacted by his physical accident.

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[5] AMA *Guides* (4th ed.).

[6] AMA *Guides* (4th ed.).

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.).

Dr. McDaniel found that claimant suffered no psychological damage because of his accident. Dr. McDaniel testified that claimant's borderline and depressive personality features and somatization were not caused or aggravated by his physical injuries. Additionally, any psychological treatment or counseling in the future would also not be related to claimant's injuries suffered on August 22, 2008. Dr. McDaniel, like Dr. Pro, saw claimant on only one occasion.

Claimant was referred by his attorney to vocational expert Karen Crist Terrill for an evaluation by telephone conference on November 11 and November 17, 2009. Ms. Terrill found that claimant was physically incapable of returning to work for respondent. Additionally, due to claimant's limited education and training, and based upon his physical limitations and age, claimant was incapable of any substantial and gainful employment. Thus, claimant would be permanently and totally disabled. This opinion was provided during the deposition testimony of Ms. Terrill. There is no mention of claimant being permanently and totally disabled in the November 20, 2009, report of Ms. Terrill.

Claimant was referred by respondent to vocational expert Steve Benjamin for an evaluation by telephone on February 10, 2010. Mr. Benjamin agreed that claimant was physically incapable of returning to work for respondent at his regular job. However, claimant does possess the ability to return to work in the open labor market. In his opinion claimant would be able to return to the open labor market and earn an entry wage of $323.47 per week. This was based upon the restrictions placed upon claimant by both Dr. Mosier and Dr. Prostic. As of the time of the regular hearing, claimant remained unemployed.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[8] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]
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> (2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.[11]

The Board will first clarify the record in this matter. Respondent disputes the admissibility of the reports of Dr. Prostic based on K.S.A. 2008 Supp. 44-510h(b)(2) and *Deguillen.*[12] In *Deguillen*, the claimant consulted Dr. Pedro Murati initially for an examination. The claimant then asked for an impairment rating letter based upon that prior examination. The Court ruled that in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed. Here, the reports of Dr. Prostic were placed into the record at the time of his deposition without any objection by respondent. The Board, in considering this issue in the past, has ruled that the longstanding "contemporaneous objection rule" applies to a workers compensation case. Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making clear the grounds of the objection.[13] Here, no objection to the medical reports was made at the deposition of Dr. Prostic. Additionally, the admissibility of the reports was not made an issue at the regular hearing. In fact, respondent, in its submission letter to the ALJ, listed the deposition of Dr. Prostic, including the (six) exhibits, again without noted objection. The admission of those medical records was not listed as an issue until the matter came before the Board. Therefore, the objection now raised is not timely and the reports of Dr. Prostic will be considered as part of this record.

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[10] K.S.A. 2008 Supp. 44-501(a).

[11] K.S.A. 2008 Supp. 510h(b)(2).

[12] *DeGuillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App.2d 747, 172 P.3d 71 (2007), *rev. denied* 286 Kan. ___ (2008).

[13] *Anderson v. Scheffler*, 248 Kan. 736, 811 P.2d 1125 (1991); State v. Carter, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

K.S.A. 2008 Supp. 44-511(a) states in part:

> As used in this section:
> . . .
> (4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.[14]

K.S.A. 2008 Supp. 44-511(b) states in part:

> The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
> . . .
> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount

[14] K.S.A. 2008 Supp. 44-511(a)(4)(5).

> earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.
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> (5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.[15]

Claimant testified that he was hired as a full-time employee, at $10.00 per hour, working a minimum of 40 hours per week. The Certified Payroll Report[16] shows that claimant was actually being paid $9.50 per hour. That hourly rate was adopted by the ALJ in the Award and is affirmed by the Board for the purposes of this Order.

Claimant also testified that he was expected to work up to 13 hours per day, 6 days per week, with overtime for every hour worked over 40. The Certified Payroll Report supports claimant's testimony on this point. Claimant only worked for three days before his accident. However, during those three days, claimant averaged 13 hours per day, with

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[15] K.S.A. 2008 Supp. 44-511(b)(4)(5).

[16] R.H. Trans., Resp. Ex. 1.

a total of 40.5 hours over the three-day period. The ALJ, following the testimony of claimant, and applying K.S.A. 2008 Supp. 44-511(b)(5), allowed 40 hours of regular time at $9.50 per hour and 0.5 hours overtime. The Board finds that claimant has proven that he was hired as a full-time worker with 40 hours per week as the base and anything over 40 hours to be paid as overtime. Therefore, the calculation of the average weekly wage at $387.13, as was determined by the ALJ, is affirmed.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[17]

Respondent contends that claimant should be limited to a scheduled injury to his left lower extremity. However, this record supports claimant's position that the significant injury to his left lower extremity caused him to develop an antalgic gait, which then aggravated his low back. Dr. Pang, the court ordered IME doctor, found that claimant's low back pain was likely related to the abnormal mechanic of the left knee and the abnormal gait. Dr. Mosier rated claimant to the whole body due to the limp developed from the left lower extremity injury. Even though the ALJ discounted the medical opinion of Dr. Prostic as being suspect, there is sufficient evidence in this record to find that claimant is experiencing permanent low back problems from the antalgic gait developed from the left lower extremity injury. The ALJ adopted the 20 percent whole body impairment rating of Dr. Mosier as the most credible, and the Board agrees and affirms same.

Claimant contends that he is entitled to a functional rating to the whole person based upon the claimed psychological impairment allegedly developed after the accident. The differing opinions in this record are almost diametrical. Dr. Pro found claimant to have significant psychological impairments from this accident. However, Dr. Pro performed no objective diagnostic testing on claimant, apparently determining the psychological impairment primarily from claimant's history and complaints. Additionally, Dr. Pro acknowledged that claimant's onset of psychological symptoms did not manifest until nine months after the accident. The DSM-IV-TR criteria states that the development of an adjustment disorder must occur within three months of the onset of stressors in order for the diagnosis of an adjustment disorder to be made. In this case, claimant's symptoms did not appear for almost nine months.

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[17] K.S.A. 44-510e(a).

Dr. McDaniel performed several diagnostic tests on claimant, ultimately determining that claimant's ongoing psychological problems stem from his past troubles, which are significant, and not from the injury suffered while claimant was working for respondent. The Board finds that claimant has failed to satisfy his burden of proving that his ongoing psychological problems are directly traceable to or were aggravated or accelerated by the accident with respondent on August 22, 2008. Claimant's functional impairment is, therefore, limited to the 20 percent whole body impairment rating above awarded.

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[18]

Claimant contends that he is permanently and totally incapable of engaging in any type of substantial and gainful employment. However, even Dr. Prostic, claimant's hired expert, initially found claimant able to return to work performing sedentary activities. Dr. Mosier restricted claimant to sedentary to light work. While vocational expert Karen Crist Terrill found claimant permanently and totally disabled, vocational expert Steve Benjamin determined that claimant could return to work within the sedentary to light-work category. The Board finds that claimant has the ability to return to the open labor market and earn wages, although not in the same capacity that he worked before this injury. Therefore, the determination by the ALJ that claimant is not permanently and totally disabled is affirmed by the Board.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of

[18] K.S.A. 44-510c(a)(2).

> permanent partial general disability shall not be less than the percentage of functional impairment.[19]

In considering the work disability to which claimant would be entitled, the ALJ first determined that claimant was not employed, and, therefore, under the recent Supreme Court analysis in *Bergstrom*,[20] claimant is entitled to a wage loss of 100 percent. The ALJ also found that the task loss opinion of Dr. Mosier was the most credible. The Board agrees and finds that claimant has a task loss of 58 percent. This, when averaged with the 100 percent wage loss, calculates to a permanent partial general disability award of 79 percent, which the Board adopts as its own.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant has failed to prove he suffered a psychological impairment as the result of the accident on August 22, 2008, but affirmed in that claimant has suffered a whole body permanent partial functional impairment of 20 percent and a permanent partial general disability of 79 percent. The remainder of the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 23, 2010, should be, and is hereby, modified in that claimant has failed to prove that he suffered any psychological impairment as the result of the accident on August 22, 2008, but the Award is affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rollin Eugene Smith, Jr., and against the respondent, Beachner Construction Company, Inc., and its

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[19] K.S.A. 44-510e.

[20] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

insurance carrier, Zurich American Insurance Company, for an accidental injury which occurred on August 22, 2008, and based upon an average weekly wage of $387.13.

Claimant is entitled to 31.00 weeks of temporary total disability compensation at the rate of $258.10 per week or $8,001.10, followed by 315.21 weeks of permanent partial disability compensation at the rate of $258.10 per week totaling $81,355.70 for a 79 percent work disability, making a total award of $89,356.80.

As of May 17, 2011, there would be due and owing to claimant 31.00 weeks of temporary total disability compensation at the rate of $258.10 per week in the sum of $8,001.10, plus 111.57 weeks of permanent partial disability compensation at the rate of $258.10 per week in the sum of $28,796.22, for a total due and owing of $36,797.32, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $52,559.48 shall be paid at the rate of $258.10 per week for 203.64 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge